Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	

COMMENTS OF WILTEL COMMUNICATIONS, LLC

WILTEL COMMUNICATIONS, LLC
Adam Kupetsky
Director of Regulatory
Regulatory Counsel

One Technology Center TC 15H
Tulsa, OK 74103
918 547 2764

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SUMMARY

The Federal Communications Commission ("FCC" or "Commission"), state regulatory agencies and the telecommunications industry all agree that the existing intercarrier compensation mechanisms must be dismantled and replaced with a system that reflects the changing market dynamics and technology prevalent in the telecommunications market today. With customers demanding and service providers offering new, bundled services, and technology blurring distinctions between different types of services, the current regulatory distinctions governing origination and termination of voice services on the public switched telephone network ("PSTN") no longer make sense and are quickly becoming counterproductive. Service providers are finding ways to blur the distinctions and thereby obtain competitive advantage through regulatory arbitrage. As it eliminates these distinctions, however, the Commission must create a replacement that avoids the present system's maladies and carefully prevents new ones from appearing.

Termination of voice traffic to the PSTN is a bottleneck service, and this LEC bottleneck creates the biggest obstacle to developing a fair and efficient unified intercarrier compensation regime. Given the opportunity, the bottleneck service provider has every incentive to provide special treatment for those service providers that have something the LEC needs. Industry consolidation only sharpens this incentive and provides greater opportunity for the LEC to discriminate. Accordingly, the Commission must take firm steps to prevent discrimination under the replacement regime. These steps must include a loosening of the so-called "all or nothing" rule in the case of termination of voice service to the PSTN.

Finally, the Commission must provide for a smooth transition to a unified regime, addressing the most extreme infirmities in the current system as quickly as possible. First, the Commission must establish interim rules to address regulatory arbitrage issues currently pending before it. Second, the Commission must require that interstate and intrastate access be equalized during the initial stages of any transition, with access charges and reciprocal compensation to follow quickly thereafter.

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COMMENTS

WilTel Communications, LLC ("WilTel") hereby comments on the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in this proceeding. The Commission, along with parties representing consumers, state regulators, and all sectors of the industry have recognized that today's intercarrier compensation mechanisms are seriously flawed because they subject similarly-situated companies to vastly different rates, terms and conditions when they interconnect exactly the same communications traffic with local exchange carriers ("LECs"). Given changing market conditions and the possibility of significant market consolidation, the Commission must work quickly to fix this broken system and establish a lasting, fair intercarrier compensation regime. WilTel applauds the Commission and all the parties that have worked hard to develop proposals that bring the Commission closer to resolving this critical problem.

I. INTRODUCTION

WilTel is a premier provider of domestic and international voice services in the United States, transporting several billion minutes of traffic per month. WilTel provides the capabilities and services that underlie some of the nation's largest retail voice businesses. WilTel owns a fully-scaled state-of-the-art national network operated by highly-skilled employees. Moreover, WilTel works diligently to comply fully with the Commission's rules, and has consistently advocated a level playing field approach in which efficiency and the ability to meet customers needs determines the fate of rival providers.

Unfortunately, lack of clarity surrounding the current and future rules governing intercarrier compensation have resulted in a situation in which the exploitation of "potential" regulatory loopholes and tolerance for regulatory risk remain key determinants of competitive outcomes.

In WilTel's case, as is true for other interexchange carriers, charges for originating and terminating traffic to the PSTN comprise nearly 80% of the cost of providing service. To the extent that certain carriers are allowed to arbitrage the system and evade such costs, or can obtain exclusive rates, terms and conditions from bottleneck service providers, they enjoy a determinative competitive advantage. Moreover, recently announced mergers, if consummated, may enhance the ability and incentive for carriers to enter exclusive arrangements for intercarrier compensation that could exclude third parties from the voice marketplace. At minimum, access prices that substantially exceed cost result in an inherent "subsidy" to the merged companies by unmerged rivals that do not control bottleneck facilities.

For these reasons, it is imperative that the Commission act quickly to reform its intercarrier compensation regime to establish a unified rate for termination of traffic to the PSTN, prevent regulatory arbitrage and ensure real nondiscrimination for a service that in all cases will be a monopoly service. Specifically, as WilTel explains below, the Commission must:

- Establish a unified rate set at zero (bill and keep) or nominally above zero.
- Prevent LECs from abusing their market power to discriminate against unaffiliated carriers under any new intercarrier compensation system. That means that LECs should not be permitted to grant special rates, terms and conditions to any party unless they are available to all other parties on a provision-by-provision basis.
- Take steps to prevent regulatory arbitrage and discrimination in the transition period before a unitary rate is established.
- Implement these reforms before permitting consummation of the SBC/AT&T and the Verizon/MCI mergers.

II. THE EXISTING INTERCARRIER COMPENSATION SYSTEMS DISCRIMINATE AMONG VOICE SERVICE PROVIDERS AND ENCOURAGE REGULATORY ARBITRAGE

Virtually every party agrees that a unified rate must replace the current system in which different rates apply to the same LEC termination service.[1] The rate disparity results in severe market distortions, provides strong incentives for companies to seek and the ability to obtain advantages through regulatory arbitrage rather than good business decisions, and causes innumerable and preventable disputes that distract companies from focusing on important business matters.

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1 Letter, dated May 18, 2005, from Robert B. Nelson, Chair, Committee on Telecommunications, National Association of Regulatory Utility Commissioners ("NARUC"), Elliott G. Smith, Chair, Task Force on Intercarrier Compensation, NARUC, and Ray Baum, Vice-Chair, Task Force on Intercarrier Compensation, NARUC, to The Honorable Kevin Martin, Chairman, Federal Communications Commission, Appendix C ("NARUC Proposal"), at 2; Letter, dated October 5, 2004, from Gary M. Epstein and Richard R. Cameron, Counsel for the Intercarrier Compensation Forum, to Marlene H. Dortch, Secretary, Federal Communications Commission, Attachment 1 ("ICF Memorandum"), at 1; Letter, dated Mary 9, 2005, from Alex J. Harris, Vice President-Regulatory, Frontier, to The Honorable Kevin Martin, Chairman, FCC, The Honorable Kathleen Q. Abernathy, Commissioner, FCC, The Honorable Michael Copps, Commissioner, FCC, The Honorable Jonathan Adelstein, Commissioner, FCC, Attachment ("Frontier Plan"), at 1.

a. PSTN Termination Will Always Be a Monopoly

The basic and undeniable underlying economic factor that confronts policy makers in dealing with intercarrier compensation is the simple fact that, despite increased levels of competition in other areas, LECs retain monopoly control over the PSTN connection to end user customers. First, there is little competition in the market for switched access services. Second, even where a competitive LEC ("CLEC") does exist, each customer's local service provider has monopoly control over the connection that other carriers require to access that customer. Thus, this is not a problem that "goes away" even if there were multiple providers in a given local market. Indeed, the Commission has recognized that this monopoly problem persists even where competition can replace regulation of other aspects of telecommunications.[2] Thus, for example, the Commission has established rules and policies limiting the ability of ILECs and CLECs to impose excessive or discriminatory terminating access charges on long distance companies who must deliver traffic to the LECs' end user customers.[3]

Universal termination of calls to all LEC customers is an essential component for any voice service provider - whether it be interexchange companies ("IXCs"), competitive CLECs, wireless carriers, paging companies, or IP-enabled voice companies. This fundamental and universal need for every type of service provider to terminate over

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2 *FNPRM* at ¶ 24.

3 *See, e.g., Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004) ("CLEC Access Charge Reform Order").* No less than ILECs, CLECs control bottleneck access to the end-users they serve on the PSTN and have an incentive and an opportunity to exploit this market power. The Commission recognized in the past that "terminating access may remain a bottleneck controlled by whichever LEC provides terminating access to a particular customer, even if competitors have entered the market," and concluded that "some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services." *CLEC Access Charge Reform Order*, ¶¶ 11, 34.

a single LEC network to reach a customer distinguishes access service and intercarrier compensation from compensation for other forms of telecommunications service. Each type of provider may have specific circumstances and unique business plans, but for competing carriers to drive efficiency and innovation they all need PSTN access at cost-based and non-discriminatory rates, terms and conditions. Yet, without adequate reform, that necessary input may not be available to some providers.

For example, while all long distance companies need access to all LEC customers, LECs do not need anything from long distance providers. Certain LECs may need access to other LECs. But IXCs who do not want to enter the local exchange market do not even have that basis for negotiation. They require PSTN termination for long distance traffic, and they have nothing to trade for that service. It should be beyond dispute that a firm should not be required to enter into a new line of business in order to compete in the interexchange long distance market.

The existing intercarrier compensation regimes attempts to address this fundamental issue by creating separate rules for each type of service. The record contains ample discussion of these rules. State tariffs govern intrastate interexchange services; FCC tariffs govern interstate interexchange services; interconnection agreements approved by state commissions govern "local" wireline services and also intra-MTA wireless services; and it is not clear what regime applies to VoIP, ISP-bound and VNXX traffic. To the extent the rules are clear and the services distinct, the competitive impact should be minimal.

b. The Existing System is Discriminatory

Although it addresses the competitive impact of the terminating bottleneck, having disparate rates for the same termination service is discriminatory. In the *FNPRM*, the Commission recognizes that the existing intercarrier compensation mechanisms "require carriers to treat identical uses of the network differently, even though such disparate treatment usually has no economic or technical basis."4 It is settled law that "the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services."5 Traffic presented to a LEC at a specific location for termination on the LEC's PSTN is the same traffic regardless of whether it originates or is handed to the LEC as a CMRS, local, interstate or intrastate long distance call. The Commission has recognized that it is reasonable that a carrier placing equal burdens on a LEC as do other carriers pay the same charge as such carriers.6 Although the existing discrepancy results largely from statute and FCC implementation, there is no longer any justification for maintaining the differences.

This discrimination seriously impairs competition in today's marketplace. If carriers only offered services within a distinct market – *e.g.*, local carriers offering only local services or long distance carriers offering only long distance services – then the existing discrimination would have little competitive impact. Local carriers competing only with other local carriers would have roughly the same cost basis for terminating traffic, and long distance carriers competing only with other long distance carriers also

4 *FNPRM* at ¶ 15. *See also* ICF Memorandum at 10; NARUC Proposal at 6.

5 *American Telephone and Telegraph Company v. Central Office Telephone*, Inc., 524 U.S. 214, 223 (1998).

6 *See, e.g., Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, *Order* (rel. April 21, 2004), at ¶ 15.

would be on the same playing field with respect to PSTN termination (and originating) charges. Increasingly, however, carriers are responding to customer demand for "bundles" of local and long distance services.7 As parties offer bundles, their cost basis for PSTN termination varies depending on the percentage of the traffic that is long distance and subject to originating and terminating access charges or local and subject only to reciprocal compensation charges. Those with a lower cost basis because of their traffic mix have an advantage - not because they are more efficient or because providing local service is inherently less costly than long distance, but, rather, solely because of the discriminatory regulatory regime applicable to each type of traffic.

c. The Existing System Encourages Harmful Regulatory Arbitrage

The existing regulatory structure not only tilts the playing field artificially, but also encourages companies to seek artificial advantages by misclassifying their traffic or seeking double recovery for their services. The Commission has established different rates, terms and conditions for different categories of service; to the extent that a LEC can correctly identify the service and bill the correct amount, then the system, albeit discriminatory for the reasons set forth above, would work smoothly and with some efficiency.8 But this is not the case. Companies are incented to misclassify their traffic to obtain the best rates.9 For example, companies send long distance traffic over local

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7 *FNPRM* at ¶ 19.

8 For example, a LEC that can identify a local and a long distance interstate call can charge the rate set forth in its interconnection agreement for the local call and the interstate tariff rate for the interstate long distance call. When it can't identify the call, however, the LEC might see a long distance interstate call as a local call because the CLEC routes the call inappropriately or masks the jurisdiction through the call detail record. In that case, the LEC would charge the long distance call as if it were a local call.

9 ILECs also engage in regulatory arbitrage. A carrier that largely provides long distance services may obtain all termination services via an interstate or intrastate access tariff. If that carrier happens to carry a small amount of local traffic, it is not able to pay the lower reciprocal compensation amount unless it enters an interconnection agreement and establishes local trunks with the LEC. Purely due to regulatory reasons, the long distance carrier would have to choose between obtaining a lower rate for a portion of its

interconnect facilities so that LECs believe they are receiving local traffic subject to reciprocal compensation and not access charges. Other companies avoid originating access charges and charge reciprocal compensation for traffic that originates and terminates in different calling areas.

This regulatory arbitrage seriously distorts the telecommunications market, causes discrimination and imposes huge transaction costs on the industry.[10] WilTel has repeatedly pointed out that inconsistent application of switched access charges distorts the market and unfairly penalizes honest competitors. The Commission has recognized that, when one carrier can obtain a market advantage by avoiding access charges through aggressive regulatory positions, its competitors are put at an unfair disadvantage. At a minimum, the Commission must not perpetuate such discrimination.

The current system forces carriers to spend countless hours and expense determining how to classify services, finding ways to game the system, dealing with disputes, and making regulatory filings. Just classifying services entails adjusting systems to reflect new rules and interpretations, coordinating USF contribution requirements with access providers and customers, and keeping track of different categories of service, all of which may ultimately be unnecessary if the interpretation is wrong. These efforts and costs are not productive because they undermine the company's ability to focus on the important things – product enhancement and development and customer service. Carriers also end up making decision based on irrelevant factors.

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traffic but spending money on a new, otherwise unnecessary trunk group and paying a higher, discriminatory rate for local traffic but foregoing the expense of the unnecessary trunk group.

10 ICF Memorandum at 12-13

III. THE COMMISSION MUST ESTABLISH A UNIFIED REGIME BASED ON BILL AND KEEP OR A NOMINAL UNIFIED RATE

To address these flaws, WilTel urges the Commission to adopt a bill-and-keep mechanism or, alternatively, to establish the lowest rate possible as a unified rate. Although a unified rate will resolve much of the problem with the current regime, a low unified rate will ensure that carriers have the proper incentives to compete for end user business and will reduce any incentive for discrimination.

A zero or low unified rate provides the greatest incentive for carriers to focus on competing for end user customers rather than on seeking revenue streams from other carriers. All LECs are monopoly service providers with respect to carriers that need to terminate traffic to called parties on such LECs' PSTN, but they compete freely with other LECs for end user customers. So, to encourage companies to provide competitive services, the Commission should provide an incentive to seek revenues from end users and not other carriers.

Some CLECs argue that a bill and keep regime will encourage carriers to "dump" out-of balance traffic on LEC networks since there will be no cost for doing so – a practice that the CLECs mischaracterize as "gaming". Although these CLECs correctly point out that both balanced and unbalanced traffic would be subject to the bill and keep rate, they fail to recognize that (1) the bill and keep mechanism assumes that the LEC's customer benefits from receiving traffic from the requesting carrier so should be willing to pay for that benefit, so the LEC is being compensated;[11] and (2) the requesting carrier

[11] *FNPRM* at ¶ 27; *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9624-25 (2001), ¶ 37; ICF Memorandum at 24-25.

must still pay to get to the LEC's edge in order terminate the traffic.[12] Accordingly, it is hard to understand how such "dumping" could be considered a form of regulatory arbitrage.

A low, unified rate also would allow the Commission to rely on a mixture of market-based and regulatory measures to address discrimination. Some parties urge the Commission to allow carriers to "opt out" of any default termination regime and set mutual rates, terms and conditions amongst themselves. Where sufficient competition exists, WilTel agrees that market forces could be used to ensure reasonable and nondiscriminatory rates, terms and conditions. As explained above, however, such forces do not exist with respect to PSTN termination of switched voice services. Allowing unfettered negotiations to develop prices, terms and conditions for local termination of all calls but only as between two parties results in severe discrimination against entities that are not parties to such arrangement and undermines the benefits of establishing a unified system for a service provided in two different markets (IXC and local). Such discrimination would be mitigated, however, if the opt out provisions (including prices) are not materially different than the default prices.

Accordingly, WilTel supports a bill and keep mechanism or, alternatively, a final PSTN termination rate similar to that proposed by the ICF as the interim rate prior to flash cut to bill and keep. Such a rate will substantially reduce any opportunity for gaming and for discrimination among carriers seeking PSTN termination. Moreover, to the extent that a zero or nominally rated PSTN termination rate caused LECs to lose

12 Letter, dated October 5, 2004, from Gary M. Epstein and Richard R. Cameron, Counsel for the Intercarrier Compensation Forum, to Marlene H. Dortch, Secretary, Federal Communications Commission, Attachment 2 ("ICF Plan"), at 10.

access revenues, they would be able to recoup it from end users or access replacement mechanisms, as proposed by certain parties in this proceeding.

IV. The Commission Must Take Additional Steps to Prevent Discrimination

Even with a low, unified PSTN termination rate, LECs will still be able to exert substantial market power unless the FCC acts forcefully to prevent it. With bottleneck control over access to called parties, LECs are and will be in a position to favor affiliates and even non-affiliated carriers who offer the LEC a *quid pro quo* that third carriers cannot match. This favoritism will distort competition in one or more markets, reduce consumer choice and undermine the benefits of intercarrier compensation reform. That is why the Commission must clearly and definitively prevent LECs from exercising this market power under any new compensation mechanism.

Given the uneven bargaining power between terminating LECs and other service providers, the Commission should not permit LECs to negotiate exclusive arrangements for voice services terminating to the PSTN. Some parties urge the Commission to allow carriers to "opt out" of any default termination regime and set mutual rates, terms and conditions amongst themselves.[13] But allowing a LEC to develop prices, terms and conditions applicable to local termination of all calls delivered by one service providers but not other service providers allows the LEC to engage in blatant discrimination that will affect the competitive landscape. If the Commission allows carriers to opt-out of a higher default rate, the result will be a multi-layered system that maintains many of the ills of the present system and distorts the competitive provision of services.

The Commission must ensure that LECs with bottleneck control over essential facilities or services cannot use their market power to discriminate against third parties.

13 NARUC Proposal at 2, 4-5; ICF Plan at 2.

LECs have the ability to leverage their market power to favor affiliates as well as non-affiliates that can provide the LEC with other benefits that a third party may not be able to offer. For example, a LEC might be willing to provide exclusive reduced PSTN termination where it has a monopoly in exchange for exclusive reduced PSTN termination where another LEC has a monopoly.[14] If WilTel is only competing in one of those jurisdictions, then it will be at a disadvantage with respect to the party "opting out" with the terminating LEC. As another example, a LEC might provide a wireless company with a zero PSTN termination rate in exchange for reduced price collocation at a MTSO or free corporate wireless services. Again, WilTel could not possibly provide the LEC with the same benefit in return for a zero PSTN termination rate.

To address this issue when it reforms the intercarrier compensation regime, the Commission must either prohibit LECs from opting out of the default mechanism or ensure that all opt out provision related to termination of voice traffic are available to all parties regardless of whether they agree to all terms of the opt out arrangement. One option is to make the unitary rate the only rate that can be applied to PSTN termination of traffic. Carriers would still be able to offset amounts owed to each other on balanced traffic, but the effective rates that apply per unit of traffic would be the same for everyone. Another option is to require LECs to make available to all carriers a PSTN termination rate to which it has agreed with another carrier. This rate must be available even if a requesting carrier is not willing or able to accept all of the arrangements contained within the applicable agreement, because those arrangements may have

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14 This scenario becomes even more probable after consummation of the SBC/AT&T and the Verizon/MCI mergers. *See, e.g.*, Applications of SBC Communications, Inc. and AT&T Corporation For Consent To Transfer Control of Section 214 and 308 Licenses and Authorizations and Cable Landing License, WC Docket 05-65, COMPTEL/ALTS Petition to Deny at 7.

nothing to do with the requesting carrier's long distance business or the geographic location in which the carriers are interconnecting.

It is not sufficient merely to require filing of "opt out" agreements and make them subject to state commission approval. In its revised Proposal, NARUC suggests that any "opt out" agreements be subject to state Commission review "to make sure all carriers have an opportunity to know and opt into negotiated rates other than the default rate…".15 While this principle is a step in the right direction, it does not go far enough because it assumes that carriers will have to adopt entire "opt out" agreements rather than the specific rates and/or provisions that directly impact their ability to compete on an even footing.16 In a unified intercarrier compensation regime, requiring service providers to adopt an entire interconnection agreement to obtain the same rates, terms and/or conditions for termination of voice traffic to the PSTN will provide an artificial advantage to certain carriers based on the Commission's determination of the "correct" business plan. Accordingly, the Commission must define more precisely the rights that an interconnecting carrier has to obtain the rates or other terms contained in an "opt out" agreement and partially reconsider its conclusions in the All or Nothing decision.17

Even in a bill and keep scenario such as that proposed by the ICF, the Commission must carefully check a LECs' market power. The ICF proposes a declining rate ultimately reaching bill and keep. As part of the proposal, service providers would have to comply with network architecture rules that include interconnecting with ILECs

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15 NARUC Proposal at 5.

16 *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier*, CC Docket No. 01-338, Second Report and Order (rel. July 13, 2004) ("All or Nothing" decision).

17 One way to do this might be to require an interconnecting carrier seeking an "opt out" rate or other term to accept all obligations agreed to by the third party in relation to the specific services and geographic area at issue.

at an access tandem. For those carriers that have already arranged for or built network facilities "beyond" the tandem to an end office, the ICF proposal provides the ILEC and the interconnecting carrier wide discretion to determine payment for those facilities. In particular, the proposal allows ILECs and other service providers to negotiate "opt out" compensation that the ILEC might pay the service provider for using its own facilities rather than rerouting traffic to the access tandem.[18] However, a third service provider that is similarly situated with the "opt out" party might not be able to negotiate for the same compensation because it may not have the same leverage.[19]

Once again, the Commission should use market forces where possible to discipline LEC market power; however, the Commission cannot expect that a LEC will exercise market power in a manner that will do anything but benefit who the LEC wants to benefit. Instead, the Commission must establish new rules that provide third parties with absolute and unconditional access to material rates, terms and conditions related to monopoly-controlled PSTN termination.

In "fixing" intercarrier compensation, the Commission must take great care to encourage and not foreclose competition in dynamic market sectors where competition flourishes today. Accordingly, it is not an answer that companies can simply enter CLEC markets or "become CLECs" in order to obtain the leverage necessary to negotiate favorable interconnection offerings. To do so would be costly, time-consuming, and difficult for many companies - as well as being irrelevant to their fundamental business plans. Such an approach effectively would prevent non-CLECs from competing in long distance markets.

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18 ICF Plan at 12-13.

19 WilTel is not concerned with traffic volume based differences to the extent they are cost-based. Traffic volumes, however, may not be the only basis used by parties to reach "opt out" arrangements.

V. The Commission Must Establish a Fast and Even-Handed Transition to the Unified Rate

In the FNPRM, the Commission recognizes that moving from the existing system to a new one will be complicated.[20] Under the current system, long distance carriers buy interconnect facilities and pay originating and terminating access charges pursuant to state or FCC tariff for any calls that originate and terminate outside a local exchange calling area. CLECs pay and receive reciprocal compensation for local traffic but also must pay access charges for interexchange traffic because their interconnection agreements require that they pay such charges pursuant to the ILECs' tariffs. Most CLECs use local interconnection trunks rather than access facilities to transfer this traffic and in many cases the terminating LEC can't tell whether the traffic is local or long distance. For some interexchange traffic (*e.g.*, that terminating to Internet Service Providers), however, the Commission's rules appear to recognize that it is not subject to access tariffs but rather to reciprocal compensation. To implement a unified regime, the Commission will have to determine how to combine the tariff and local interconnect mechanisms for PSTN termination – and how to do so without providing one group with an artificial, regulatory-driven advantage over another.

a. Any Transition to a Unified, Nondiscriminatory Rate Should Occur Quickly and Focus on Unification Before Rate Level

WilTel urges the Commission to adopt a quick transition to a unified rate level. A quick transition will reduce the opportunity for discrimination and regulatory gaming until a unified rate becomes effective. Such a transition would allow the Commission to phase in any LEC revenue recovery mechanism and reduce access rates incrementally.

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20 *FNPRM* at ¶ 116.

During such a transition, the Commission should require, first, that LECs reduce intrastate access rates to interstate access rate levels and eliminate originating access charges[21] and, second, that LECs reduce all access rate levels to reciprocal compensation levels and then ultimately to the final unified rate level. This approach is similar to the ICF approach, except that the ICF approach would also reduce reciprocal compensation levels even before access rates are at parity with reciprocal compensation rates.[22]

WilTel does not have a position at this time regarding how the Commission should accomplish these first two steps, provided that they happen quickly.[23] For more than 3 years, the Commission has recognized that its current intercarrier compensation rules do not address many of the high-dollar issues that are in dispute among carriers. Although the Commission has sought to address some of these issues, it has deferred action on most of them. In the interim, parties have been forced to allow disputes to linger on their books or to settle even where they believed they were correct. This uncertainty encourages certain companies to take positions that entail regulatory risk in the hope of obtaining revenues and/or market share that they would not obtain if the rules were clear. Accordingly, these issues cannot wait until the Commission has put a uniform rate into effect.

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21 Both the ICF Proposal and Alternative 1 of the NARUC proposal support elimination of originating access charges. *See* ICF Plan at 31-32; NARUC Proposal at 2-3. WilTel agrees. A unified system is not possible if one type of carrier is paid for originating traffic and another must pay for it. Moreover, originating access avoidance is one of the primary benefits that CLECs receive from VNXX and continued originating access requirements will continue to present opportunities for its avoidance. Finally, some proponents of continued originating access charges assert that such charges recover the cost of equal access. NARUC Proposal at 3-4. However, equal access costs generally have already been recovered or are recovered through other mechanisms.

22 ICF Plan at 31-41.

23 Many parties have argued that the Act already permits the FCC to set intrastate and interstate access rates. *See, e.g.* ICF Memorandum at 28-38. Without commenting on this issue, WilTel believes that it would be preferable to provide a strong incentive for states to voluntarily enact reform in line with the FCC's decision, provided that such a decision is taken quickly and without possibility of reversal. *See* NARUC Proposal at 14.

WilTel's approach would provide for a reasonable, quick transition to a unified rate. At the same time, it would minimize the opportunities for regulatory gaming and discrimination that would exist so long as the difference between long distance and local PSTN termination rates are materially different.

B. The Commission Must Take Additional Steps to Prevent Regulatory Arbitrage

Although a low, unified rate level and a quick, reasonable transition will address many regulatory gaming and discrimination issues, the Commission must do more during the transition period. The Commission must take steps to prevent regulatory arbitrage and otherwise to clarify application of its rules until a unified rate is in effect. First, the Commission must decide, on an interim basis, all of the pending disputes before it. Second, the Commission should make sure that the new intercarrier compensation regime does not provide additional room for regulatory gaming.

The Commission must address the current system's ills during any transition period. These issues include: Jurisdictional treatment of wireless-originated long distance calls; VNXX and F/X services, ISP-bound services and IP-originated and IP-terminated services. To the extent that the unified rate does not come into existence immediately, WilTel proposes that the Commission enact interim, transition rules to address pending disputes based on the record in those proceedings or in this docket.

WilTel has repeatedly pointed out that inconsistent application of switched access charges distorts the market and unfairly penalizes honest competitors. The Commission has recognized that, when one carrier can obtain a market advantage by avoiding access charges through aggressive regulatory positions, its competitors are put at an unfair disadvantage. And, while in the long term, comprehensive intercarrier compensation reform ultimately should address such regulatory arbitrage, in the short term the FCC must address market distortions caused by discrimination in the application of access charges. At a minimum, the Commission must not perpetuate such discrimination.

As an initial matter, the Commission must clarify its rules regarding transmission and use of call-identifying information. So long as jurisdiction determines the intercarrier compensation amount, service providers must determine the jurisdiction. Although the Commission has never ruled how service providers must determine jurisdiction, many ILECs do so by looking at the calling and the called telephone numbers. This method may not be correct because it doesn't always accurately reflect the true originating and terminating location of the call. Moreover, some service providers may not be passing calling party number ("CPN") or may be passing a false CPN, even though the Commission's rules generally require that CPN be passed and not altered.

The Commission's failure to impose clear rules addressing determination of jurisdiction and passing of call identifying information has resulted in a number of disputes, as described below. WilTel agrees with NARUC that the Commission must address this phenomenon, at least in the transition period. Like NARUC, WilTel believes that the Commission should make sure that each carrier passes appropriate signaling information that allows LECs to identify the traffic real time or after the fact. However, while NARUC proposes that LECs not be required to terminate "phantom traffic",[24] WilTel proposes a less draconian approach. First, the Commission must define exactly what type of detail service providers must pass in the call detail records. Second, the Commission should require ILECs to issue bills based on the most accurate information

24 NARUC Proposal at 6-7.

in the call detail records (which may be different for wireless or IP originated calls than for wireline originated calls). Third, the Commission should require ILECs to establish a process and work in good faith with competing carriers to address and resolve contentions that the call detail record is not the most accurate determinant of jurisdiction in a particular case. Finally, the Commission should create an expedited dispute resolution process to address unresolved disputes.

1. Jurisdictional Treatment of Wireless-originated Long Distance Calls

The Commission should require that LECs determine jurisdiction for wireless-originated calls based on the best available information concerning the originating location of the call and not on the basis of CPN. The record is clear that CPN is not the most accurate jurisdictional identifier for this traffic.25 Accordingly, the Commission must establish a new jurisdictional identifier along with rules requiring accurate passage of such identifier or simply require LECs to work in good faith with service providers to determine the correct jurisdiction.

2. VNXX and F/X Services

The Commission should determine, on an interim basis, that VNXX and F/X calls are not currently 251(b)(5) traffic, even if the Commission determines that such calls will fall under Section 251(b)(5) at some date in the future. If the Commission decides that VNXX traffic is covered by 251(b)(5) and is subject to reciprocal compensation and not to originating access charges, the Commission should apply that ruling to all carriers and not just CLECs. Accordingly, the Commission should require LECs immediately and without charge to allow IXCs or their affiliates to use access trunks to receive VNXX and

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25 *See, e.g.*, Petitions of Global Crossing Telecommunications, Inc. and SBC Communications Inc., Petitions for Declaratory Rulings, WC Docket No. 04-424, Comments of Sprint Corporation at 2-3.

similar traffic at nondiscriminatory rates, terms and conditions and regardless of whether other local traffic is carried over such trunks.

Applying the ISP-bound traffic compensation scheme to VNXX traffic could result in unlawful discrimination, in which providers of conventional long-distance services would be subject to access charges, while providers of virtually identical interexchange and toll traffic would be exempt from paying access charges and could even qualify to receive reciprocal compensation payments.[26] Regardless of how the Commission decides the question of the proper compensation scheme for calls bound for Internet service providers in the calling party's local calling area, it cannot apply that regime to telecommunications traffic that is completed to a carrier's customer outside of the local calling area unless it is willing to extend the regime to any carrier that competes for the same traffic.

3. IP-originated and IP-terminated Services

The Commission should determine a rate to be applied immediately for IP-originated and IP-terminated Services. Diverging termination arrangements distort the marketplace and hinder the development of VoIP services. The lack of clarity regarding the rules governing termination of VoIP traffic to the PSTN means that there may be numerous different economic arrangements governing interconnection. This creates regulatory uncertainty that limits to introduction of IP-enabled services. Moreover, when some companies are subject to higher prices and inferior terms and conditions than others for interconnecting identical traffic, those companies are not the only ones harmed. All potential VoIP consumers are harmed by market distortions that weaken competition.

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26 *See* Letter, dated October 7, 2004, from Adam Kupetsky, Director of Regulatory and Regulatory Counsel, WilTel Communications, LLC, to Marlene H. Dortch, Secretary Federal Communications Commission.

Accordingly, if it has not already addressed the issue, the Commission should set an interim rate for VoIP services during the transition to a unified rate.27

VII. CONCLUSION

For the foregoing reasons, the Commission should establish a unified rate of zero or close to zero for intercarrier compensation, establish rules to ensure nondiscrimination by LECs with market power and implement a speedy, fair transition to the new compensation regime. During this transition, the Commission should decide pending disputes on an interim basis pending implementation of the unified system.

Respectfully submitted,

WILTEL COMMUNICATIONS, LLC

By: ______________________

Adam Kupetsky
One Technology Center TC15H
Tulsa, OK 74103
918 547 2764

Its Attorney

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27 *See* IP-Enabled Services, WC Docket No. 04-36, and Level 3 Petition for Forbearance, WC Docket No. 03-266, Letter, dated February 23, 2005, from David L. Sieradzki, Counsel for WilTel Communications, LLC, to Marlene S. Dortch, Secretary, Federal Communications Commission, Attachment 2.